STATEMENT OF DON T. HIBNER, JR. BEFORE THE ANTITRUST MODERNIZATION COMMISSION, JULY 28, 2005 "CIVIL REMEDIES: JOINT & SEVERAL LIABILITY, CONTRIBUTION AND CLAIM REDUCTION"

It is with pleasure that I submit the within Statement on the topic "Civil Remedies: Joint & Several Liability, Contribution, and Claim Reduction." As requested in the Commission's letter of July 24, 2005 to the undersigned, my remarks may be summarized as follows:

STATEMENT SUMMARY

1. As I testified before the United States Senate Subcommittee on Antitrust, Monopoly and Business Rights of the Committee of the Judiciary, in support of S. 1468, June 12, 1979, I favor an amendment to Section 4 of the Clayton Act to allow any person who is liable for damages in an action brought under the Clayton Act, to claim contribution from any person jointly liable for such damages. In accessing an allocative formula for contribution, a court will make its determination on the basis of the relative magnitude in the affected market of each such competitor's sales or purchases of goods or services subject to the violation. In determining contribution shares with respect to all other claims, the court should consider the relative responsibility of each party for the origination or perpetration of the violation for which damages have been awarded, including the benefits derived therefrom.

2. In essence, I favor a bill substantially similar to that prepared by former Assistant Attorney General William F. Baxter, and introduced by Representative McClory, as H.R. 5794, 97th Congress, 2nd Session (1982).

3. In determining the level of deterrence, or lack thereof, that would result from an amendment to the Clayton Act providing for contribution among joint tortfeasers, civil remedies must be considered in conjunction with all other competition sanctions, including criminal penalties, and individual and perhaps cumulative actions taken by other countries, including potentially duplicative actions brought under the antitrust laws of the various states. In relation to the cumulative effect of all possible competition law sanctions, the reduction in deterrent value by allowing for contribution should be marginal. Antitrust sanctions have increased substantially over time.

4. Contribution makes sense because of the progress of antitrust jurisprudence in the last generation. Particularly since the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvannia, Inc.,[1] and Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,[2] antitrust law has become increasingly economically rational, and accordingly, more outcome predictive. It is more easily recognized that individual antitrust violators may have varying degrees of culpability, and that accordingly, the application of the developing law of comparative fault may readily be assessed by the courts, as in other areas.

5. While sharing agreements have been widely in use, particularly in horizontal price fixing cases, since at least the 1960's, they are not a panacea for the continuation of the rule in Merryweather v. Nixan.[3] They are problematic in heterogeneous product or service industries, and are most likely to be efficient in horizontal price fixing cases, where each participant makes sales to the plaintiffs.

6. In essence, the over-arching rationale for amending the Clayton Act to provide for contribution and claims reduction is not only "basic fairness", but allocative efficiency itself. The accumulation of potentially annihilative antitrust remedies is more likely to over-deter aggressive competition on the merits, and may promote productive and allocative inefficiency. This should not be the role of antitrust. To allow cumulative and duplicative recovery against one actor among many, may well do a disservice to competition policy itself, by deterring the very conduct that is the grist of the competitive process.

Attached as Exhibit "A" is a xerox of H.R. 5794.[4]

---

[1] 433 U.S. 36 (1977).

[2] 429 U.S. 477 (1977).

[3] 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). (Contribution among joint intentional tortfeasors disallowed in equity, as intentional wrongdoing is deterred by refusing to diminish the burden of total liability. See Prosser, LAW OF TORTS Section 50 (4th Ed. 1971)).

[4] See Appendix B, Contribution and Claim Reduction in Antitrust Litigation, MONOGRAPH NO. 11 (1986). ("Monograph 11").

STATEMENT

1. Introduction– The Background of the Debate

The domain of discourse is a tradeoff between the perceived unfairness of a rule of non-contribution among economic actors bearing relative cumulative fault, and the degree of antitrust compliance that would result in the wake of diminished cumulative penalty regimes. This is basically the structure of the ABA Antitrust Section Monograph 11 "Contribution and Claim Reduction in Antitrust Litigation", first published in January, 1986.

As a result of a decision by a divided Eighth Circuit panel in Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.,[5], new life was injected into the debate over the relative merits of Lord Kenyon's rule against contribution among intentional joint tortfeasors. In Professional Beauty Supply, a wholesaler, "Professional," sued a rival wholesaler, "National" for entering into an exclusive distributorship agreement with another wholesaler, "La Maur." Defendant National filed a third-party complaint for contribution and indemnification. In an appeal from an order dismissing the third-party complaint, the Court of Appeals for the Eighth Circuit reversed, in part, and held that pro rata contribution was appropriate. There was more than a hint of a collusive relationship between Professional and La Maur. The Professional Beauty Supply court stated:

> "The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer."[6]

---

[5] 594 F.2d 1179 (8th Cir. 1979).

[6] Id. at 1185-6.

The Professional Beauty Supply court also disposed of a number of arguments that have been injected into most, if not all, discussions on the merits, or lack thereof, of modifying or eliminating the rule in Merryweather. The court found it unpersuasive that the impleading of third-party defendants would interfere with the plaintiff's control of its lawsuit. The court noted that the trial court had ample tools available to control the situation. Clearly, where the contribution formula was pro rata, and not on the basis of comparative fault, management problems should be minimal.

While Merryweather was a suit in equity decided in 1799, it remained the "general rule" until at least the 1930's. In the 1930's, professional opinion began to favor relaxing the rule against contribution in various circumstances, particularly among unintentional tortfeasors. In England, for example, contribution was established by statute in 1935.[7] In the United States, the Uniform Contribution Among Tortfeasors Act was promulgated in early 1939.[8] As of 1986, thirty-six states had established various contribution regimes by statute, while five others authorized contribution judicially.[9]

Except for antitrust cases, the federal courts have followed this trend, notwithstanding that the rule in Merryweather was the law in the United States for over one hundred years.[10]

Perhaps the greatest impetus to heightened interest in modifying the rule of noncontribution among intentional tortfeasors in the antitrust field was the 1966 amendment to Federal Rule of Civil Procedure 23. This led to the perceived potential for disproportionally excessive damages, where the entire brunt of treble damage recovery could be assessed against one of a number of legally culpable actors, and on a massive scale. As a result, while the

---

[7] See, THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, 25 & 26 Geo. 5, ch. 30 Section 6(1)(c).

[8] See, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Section 1, 12 U.L.A. 60 (1975). (see, note to 1939 Act.)

[9] See, Monograph 11, p. 6, fn. 37.

[10] Some states, including California, have adopted various regimes allowing for contribution among joint tortfeasors, but holding that contribution shall not be allowed among intentional tortfeasors. See, e.g., CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 875(d) ("there shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.")

defendant singled out would pay a disproportionately excessive amount of damages, his cohorts could remain unscathed. Particularly suspect among many defense lawyers was the Corrugated Container Litigation.[11]

Legislation providing for contribution and claim reduction in price fixing cases was first introduced in the United States Senate in May, 1979 by Senator Bayh. In May, 1979 he introduced contribution legislation as an amendment to S. 390, 96th Cong., 1st Sess. (1979). It was entitled "The Antitrust Improvements Act".

On June 12, 1979, the undersigned appeared with Thomas M. Scanlon, of Indiana, and Harold Kohn of Pennsylvania. Statements were filed and testimony given. Mr. Scanlon and I generally endorsed legislative action to provide for contribution. I testified that the basic consideration was that of "fairness". However, while I generally supported the Bayh amendment, I did not enthusiastically support its provision for pro rata contribution, subject to court discretion, and limited to price fixing cases. It did not mandate contribution in other types of antitrust cases. In fact, if it had been enacted prior to Professional Beauty Supply, it would have been inapplicable. This was because Professional Beauty Supply was an exclusive dealing case. Nevertheless, I recognized it as a welcome "rifle shot" designed to provide relief where needed most, namely as an antidote to the abuses perceived in broad-spectrum class actions.

In July, 1979, a second contribution bill was introduced, and public hearings held. In September, 1979, a task force of the Antitrust Section of the American Bar Association issued a majority report, favoring contribution and claim reduction legislation. A minority report opposed contribution and claim reduction, on the ground that a lessening of the deterrent level of exposure to antitrust violators would be counter productive to competition policy, as well as

---

[11] In re Corrugated Container Antitrust Litigation, 1981-1 Trade Cas. (CCH) ¶64,114 (S.D. Tex. 1981). See, discussion, Monograph 11 at p. 11. See also, In Re Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. 1979) (unreported) and State of Alabama v. Blue Bird Body Co., 614 F.2d 292 (5th Cir. 1980).

make antitrust litigation unmanageable.[12] In March, 1980, a contribution bill was introduced in the House of Representatives, as H.R. 6792.[13]

In Texas Industries, Inc. v. Radcliff Materials, Inc.,[14] a unanimous Supreme Court held that there was no right of contribution among defendants in antitrust litigation. Texas Industries however, did not end the debate engendered by Professional Beauty Supply, Inc.[15] It heightened it. The Supreme Court's decision was based on the absence of a statutory right of contribution. The Court concluded that neither the Sherman nor Clayton Act gave the federal judiciary the power to formulate a contribution remedy, pursuant to case law.[16] Writing for the Court, Chief Justice Burger opined

> "In declining to provide a right of contribution, we neither reject the validity of those arguments [in favor of contribution] nor adopt the view of those opposing contribution. Rather, we recognize that regardless of the merits of the conflicting arguments, this is a matter for congress, not the courts, to resolve."[17]

In March, 1982, then Assistant Attorney General William F. Baxter presented a contribution and claims reduction bill prepared by the Antitrust Division, and introduced by Congressman McClory. While the bill favored by the Senate Judiciary Committee, and favorably reported as S. 995, provided for contribution, but only in price fixing cases, the bill supported by General Baxter would extend contribution relief to any person liable for damages in any action brought under the antitrust laws, with relief to be based upon comparative fault.

For the reasons stated herein, this is the approach that I recommend for this Commission's due consideration.

---

[12] See, ABA Antitrust Section, Report of the Section of Antitrust Law with Legislative Recommendations (September 6, 1979), reprinted as Appendix A to MONOGRAPH 11.

[13] H.R. 6792, 96th Cong. 2d Sess. (1980).

[14] 451 U.S. 630 (1981).

[15] 594 F.2d 1179 (8th Cir. 1979).

[16] 451 U.S. at 642-44.

[17] Id. at 646.

2. **A Bit of Prologue– The Changing Landscape of Antitrust Cumulative Exposure.**

After graduating from Stanford Law School in 1962, I joined the firm of Sheppard Mullin Richter & Hampton, in Los Angeles, California. I became a partner in 1968, and remained active until 2002. At that time, I retired, and became "Of Counsel".[18] Shortly after joining Sheppard Mullin Richter & Hampton, I was "drafted" into the Electrical Equipment Antitrust Cases. Beginning in 1964, I was an active participant in what became generally known as the West Coast Concrete Pipe Antitrust Cases. Since 1967 I have been an active participant in the affairs of the Antitrust Section of the American Bar Association. I have served as the chair of its Private Antitrust Litigation Committee, and its Franchising and Distribution Law Committee. I've also served as a member of the Council of the American Bar Association Section of Antitrust Law, including service on its Nominating Committee, its Publication Committee, and as a member of the Editorial Board of Antitrust Law Developments, (Second through Five). Through an active career of 43 years, I have lectured and written extensively on antitrust issues.

The landscape of antitrust was substantially different in 1962. A few comparative examples may suffice. In 1955, Section 1 of the Sherman Act was amended to change the maximum fine for a corporation from $5,000 to $50,000. In the Electrical Equipment Antitrust Cases, over 2,000 cases were filed within most of the district courts in the United States. There was no judicial mechanism, other than 28 USC 1404(a), to consolidate the cases for discovery or trial. Section 1407, dealing with the administration of multidistrict litigation, was not enacted until 1968. The Prettyman report, and the Manual for Complex Litigation were in discussion stages only. In fact, the only workable method for the administration of these complex cases was to have a hearing on motions in a designated court, and to have the various district judges in other district courts engage in a form of "conscious parallelism", and to adopt the same rulings as the "lead court", when the same motions were argued, in essentially mock hearings, in each of

[18] This Statement is made as a private citizen, and does not reflect the views of Sheppard Mullin Richter & Hampton, or any other organization, including but not limited to the American Bar Association Section of Antitrust Law, the State of California Section of Antitrust Law and Unfair Competition, or the Los Angeles County Bar Association Section of Antitrust Law and Unfair Competition.

the district courts in which Electrical Equipment Antitrust Cases were pending. In fact, this worked pretty well.[19]

More importantly, however, class action litigation, as we know it today, did not exist. Rather, Federal Rule of Civil Procedure 23 was not amended until 1966, arguably as a result of the Electrical Equipment Antitrust Cases. The pre-1966 Rule 23 provided for "hybrid" or "spurious" actions, based upon former Equity Rule 38. Thus, the deterrent value of criminal penalties,[20] which had greatly been increased through time, joined forces with amended FRCP 23 liability, ratcheting cumulative exposure to an unprecedented height.

On the other side of the ledger, however, was a series of court decisions grounded upon the increasingly encroaching landscape of per se illegality. This was an era when the Supreme Court thought it recognized an alternative Congressional purpose in competition policy, namely to prefer a system of "small producers," [21] to allocative efficiency and consumer welfare. By the mid-1960's "small dealers and worthy men"[22] were the preferred patrons of Supreme Court antitrust jurisprudence. [23]

---

[19] By the time the West Coast Concrete Pipe Antitrust Cases were filed, in numerous districts within the Ninth Circuit., but also including an action in New Mexico, the Ninth Circuit appointed District Judge Martin Pence, of the District of Hawaii, as a district judge to sit in each of the districts within the Ninth Circuit in which cases were pending. Judge Pence "rode circuit" among the various district court venues. This was a highly successful methodology for conserving judicial resources and leading to the eventual settlement of these complex cases.

[20] Section 1 of the Sherman Act remained a "misdemeanor" statute until its amendment in 1974. See, Public Law 93-528, Section 3 (1974). At that time, the maximum prison sentence was changed from one year to three years, and the maximum corporate fine was increased to $1 million, if a corporation, and $100,000 for any other person.

[21] See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

[22] United States v. Trans-Missouri Freight Ass'n. 116 U.S. 290, 323 (1897)

[23] See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); and United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

The "poster child", however, of the preferred "small dealers and worthy men" came to us in United States v. Arnold, Schwinn & Co.,[24] and Albrecht v. Herald Co.,[25]

This panoply of questionable case law engendered substantial commentary and criticism from antitrust practitioners and economists.[26]

The landscape was substantially modified, and for the better, however with the Supreme Court decisions in Continental T.V., Inc. v. GTE Sylvannia, Inc.[27] and Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.[28] I submit that these two seminal decisions represent a critical analytical path of epoch significance in American antitrust law. Continental not only transformed vertical restraints law, but was instrumental and encouraging, if not mandating, the increased use of economic analysis in most other areas of antitrust law. It's influence has been readily apparent in a number of decisions that continued to roll-back the application of per se rules in horizontal as well as vertical cases.[29] Also of significance, was the publication by Professor Bork of "The Antitrust Paradox".[30] The book expands upon the "crisis in antitrust"

---

[24] 388 U.S. 365 (1967)

[25] 390 U.S. 145 (1968).

[26] See, e.g., Hibner, Territorial and Customer Limitations: What's Left of Distribution Arrangements, 45 ABA ANTITRUST L.J. 300, 301 (1975), (as man is a "territorial animal," Schwinn, may be described as perhaps "an unnatural act," and a "crime against nature"); Izard, Of Bicycles and Beer: Vertical Territorial and Customers restraints from Schwinn to Coors, 26 MERCER L. REV. (1975). I've also been privileged to offer critical comment on other antitrust concepts of dubious origin. See, e.g., Hibner, Attempts to Monopolize: A Concept in Search of Analysis, 34 ANTITRUST L.J. 165 (1967) (criticism of Lessig v. Tidewater Oil, 327 F.2d 459 (9th Cir. (1964) (allowing inference of "dangerous probability" from inference from "specific intent", derived from evidence of "overt acts"); Hibner, Oligopoly Under Attack: New Approaches to an Old Problem, 44 ST. JOHN'S L. REV. 529 (1970) (critique of inferring antitrust duality from oligopoly market structures); Hibner, Selected Problems in Vertical Restraint Cases, 26 MERCER L. REV. 389 (1975) (critique of application of Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) in support of per se illegality in distributorship termination and substitution cases).

[27] 433 U.S. 36 (1977).

[28] 429 U.S. 477 (1977)

[29] See, e.g., Hibner and Hasegawa, The Silver Anniversary of an Antitrust Sea-Change: Continental T.V. and Brunswick at Twenty-five, 11 COMPETITION 27 (2002).

[30] Robert H. Bork, THE ANTITRUST PARADOX 82 (1978).

thesis of his 1965 articles with Professor Bowman.[31] In his book, Professor Bork essentially declared "victory" for his thesis of allocative efficiency as the sole defensible object of antitrust enforcement.[32]

The roll-back of per se and archaic, wooden rules continued beyond Continental T.V. and Brunswick. In 1984, two important decisions included Jefferson Parish Hosp. Dist. No. 2 v. Hyde,[33] and Monsanto Co. v. Spray-Rite Service Corp.[34] Jefferson Parish announced a truncated rule for the analysis of alleged tying cases, with a market power screen, to test the degree of foreclosure. Monsanto taught that inferences of concerted activity were inappropriate, absent "evidence that tended to exclude the possibility of independent action." In order to find collusion, there must be direct or circumstantial evidence that reasonably tends to prove that the parties had a conscious commitment to a common scheme designed to achieve an unlawful object.

As a net result, fewer antitrust cases of questionable lineage have been brought in recent years, particularly in the areas relating to vertical restraints. The whole category of dealership termination and substitution cases, which had been in the hundreds, were now relegated to the scrap heap of antitrust, absent assistance from the vertical price fixing mantra of Dr. Miles, and the ancient rule against "restraints on alienation."[35]

With the roll-back of per se rules, and with advancements in economic analysis, including game theoretic business strategy analysis, it became clearer that there were perhaps gradations of fault among those who would nevertheless be jointly and severally liable for injuring a plaintiff in its business or property, within the meaning of Section 4 of the Clayton

---

[31] See, Bork and Bowman, The Crisis in Antitrust, 65 COLUM. L. REV. 363 (1965).

[32] Supra, note 28, page 287.

[33] 466 U.S. 2 (1984).

[34] 465 U.S. 752 (1984). See, also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (group boycotts subject to rule of reason).

[35] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 383 (1911). Dr. Miles, it self, has been substantially limited by the Supreme Court's decision in Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988). (vertical price fixing requires setting of price or price level, and State Oil Co. v. Khan, 522 U.S. 3 (1977)).

Act. Thus, while the post Continental T.V. trend has been to eliminate a number of "false positives" that otherwise would have heightened antitrust exposure, albeit unnecessarily, it would seem more appropriate to measure the comparative fault of antitrust actors, where possible to do so. This has certainly become part of the landscape of the contribution discussion, as represented by General Baxter's approach in the Antitrust Division's proffered H.R. 5794. Rather than being limited to horizontal price fixing cases, H.R. 5794 would be applicable to all antitrust violators who would be liable for damages brought under Section 4 of the Clayton Act. A determination of the appropriate liability for a violator in other than a price fixing among competitors case, would be the relative responsibility of the actor.[36]

Through time, the level of deterrence in antitrust cases has risen markedly and substantially. In 1974, a Section 1 violation had become a felony, and the maximum fine for a corporation was $1 million, and $100,000 for "any other person".[37] By 1990, the maximum fine for a corporation for a single violation was $10 million, and a maximum fine for "any other person" was $350,000.[38] However, substantially larger fines could be imposed pursuant to the Comprehensive Crime Control Act and the Criminal Fine Improvements Act,[39] which provides that the fine may be increased to twice the gain from the illegal conduct or twice the loss to the victims. The Antitrust Division utilized the "twice the gain or twice the loss" standard in obtaining a $70 million and a $30 million fine in a two count case against Archer Daniels Midland Company.[40] In addition to the fine set in the Archer Daniels Midland lysine and citric acid case, other fines under this provision include $500 million from Hoffmann-LaRoche, in a vitamins case, $225 million against BASF AG, in another vitamins prosecution, and $135 million against SGL Carbon AG, $134 million against Mitsubishi Corp., and $110 million against UCAR International, in graphite electrodes cases.

---

[36] See, H.R.5794 Sections 4I(a) and Section 4I(f)(2) and (3).

[37] Act of December 21, 1974, Public Law 93-528, Section 3.

[38] Act of November 16, 1990, Public Law 101-588, Section 4(a); 15 U.S. Code, Section 1 (2000).

[39] 18 U.S.C. Section 3571-3574 (2000).

[40] See, United States v. Archer Daniels Midland Co., Crim. No. 96-CR-00640 (N.D. Ill. October 15, 1996).

On June 22, 2004, the President signed the Antitrust Penalty Enhancement Act. Section 215 of the Act increased both the fines and the statutory maximum terms of imprisonment for Sections 1, 2 and 3 of the Sherman Antitrust Act. The Act increased the maximum term of imprisonment from 3 to 10 years, increased the maximum fine for corporations from $10 million to $100 million, and increased the maximum fine for individuals from $350,000 to $1 million.

Through the years, we have also seen increased deterrence through the authorization of parens patriae actions. Efforts by the state of California to recover damages for its citizens in a parens patriae capacity was squarely rebuffed by the Ninth Circuit in California v. Frito-Lay, Inc..[41] As a reaction, Congress passed Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which provided parens patriae authority to the states.[42] Title III authorizes a state attorney general to bring an action for injuries to natural persons residing within that state. Through the National Association of Attorneys General (NAAG), such actions have become highly publicized and highly popular. For example, in the wake of the Federal Trade Commission proceeding in Toys R Us[43] forty-four separate states filed parens patriae actions against Toys R Us and its major domestic toy suppliers, for alleged price fixing.[44] It is submitted that with the increasing range of penalties available against antitrust defendants, deterrence should remain strong, even with the enactment of contribution and claim reduction legislation.

However, the above may pale into relative insignificance in light of the real prospects for multiple recoveries for the same violation. Most state antitrust statutes track their federal counterpart by provided for the recovery of actual and exemplary damages by a private plaintiff who proves injury by reason of an antitrust violation. Although state antitrust laws have coexisted with the federal antitrust laws for over a century, the question whether damages, whether actual or exemplary, may be recovered from more than one sovereign was never

---

[41] 474 F.2d 774 (9th Cir. 1973).

[42] 15 U.S.C. Section 15 c-h (2000).

[43] 1998 FTC Lexis 229 (1998), aff'd, 221 F.3d 928 (7th Cir. 2000).

[44] See, In Re Toys R Us Antitrust Litigation, 191 FRD 347 (E.D.N.Y. 2000).

completely settled.[45] In California v. ARC America Corp.,[46] however the Supreme Court implied that direct purchasers could recover treble damages under federal antitrust law, while indirect purchasers could recover damages attributable to the same anticompetitive conduct under state antitrust law.

The theory of ARC America is that pursuant to Illinois Brick[47] only overcharged direct purchasers, and not subsequent indirect purchasers, are entitled to recover the full measure of treble damages under Section 4 of the Clayton Act. The issue arose in the Arizona Cement Antitrust Cases. Various states, including California, were indirect purchasers of cement. They brought class actions against various cement producers in various federal courts, seeking treble damages under federal antitrust laws for an alleged nationwide conspiracy to fix cement prices. They also sought damages for alleged violations of each state's respective state antitrust laws, which arguably allowed indirect purchasers to recover for all overcharges passed on to them by direct purchasers. The cases were MDL'd to the District Court of Arizona, and substantial settlements were reached with several major defendants. When the states sought payment out of the settlement fund for their state indirect purchaser claims, members of the direct purchaser class objected. The district court refused to allow any claims, citing Illinois Brick. The Ninth Circuit affirmed, holding that depending on how they were construed, the state's statutes would either conflict directly with federal antitrust policy under Illinois Brick, or would impermissible interfere with the federal antitrust policy goals articulated in Illinois Brick and Hanover Shoe.[48]

The United States Supreme Court reversed. It held that state indirect purchasers statutes are not preempted by federal antitrust law. There was no claim of express preemption or of Congressional "occupation of the field". The Court held that Hanover Shoe and Illinois Brick merely construed federal antitrust law, and did not consider state law or preemption standards, or define the inter-relationship between federal and state law. The Court stated that nothing in

---

[45] See, however, Tex. Bus. & Com. Code Ann. Section 15.21(a) (West 1987) (no state recovery allowed where substantially the same conduct has resulted in award under federal law). See also, Mo. Stat. Ann. Section 416.151 (West 2001).

[46] 490 U.S. 93 (1989).

[47] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[48] Hanover Shoe, Inc. v. United States Machinery Corp., 392 U.S. 481 (1968).

Illinois Brick suggests that it would be contrary to the Congressional purposes of antitrust laws for states to allow indirect purchasers to recover under their own antitrust laws.

In Associated General Contractors, Inc. v. California State Counsel of Carpenters, [49] the Supreme Court articulated the potential for duplicative recovery as a factor in narrowing the standards for standing to sue as an antitrust plaintiff. However, in light of ARC America, the specter of duplicative recovery is beyond a mere potentiality. It is real. It is here, and now.[50]

At last count, nineteen states and the District of Columbia had statutes that specifically permit indirect purchasers to recover damages for state antitrust law violations. Twenty-two states and the District of Columbia provide for parens patriae actions. In addition, at least one district court had recently found that states whose antitrust statutes are to be interpreted in light of Section 5 of the Federal Trade Commission Act, may maintain actions for restitution or disgorgement on behalf of indirect purchasers.[51] I suggest that the cumulative deterrent effects are clearly ample for anyone who can meaningfully appreciate the consequences of his or her conduct, as violative of the antitrust laws.

3. **The "Blurring" of Individual Actor Culpability In a "Rule of Reason" World Warrants Relative Responsibility Analysis By a Contribution Court**.

Unfortunately, duplicative antitrust actions, both claiming damage for the same violation, are routine in present day antitrust practice. In my estimation, this is the single most important issue of the allocative efficiency implications of over-deterrence through cumulative exposure.

Allowing contribution and claim reduction in antitrust cases will not materially effect the likelihood of antitrust violations being induced by under-deterrence. It is undoubtedly correct that one man's deterrence may be another man's incentive. Deterrence may be measured upon a broad spectrum, or even a continuum. Assuming symmetrical information flows, various

---

[49] 459 U.S. 519 (1983).

[50] For a discussion of the economics issues involved in treble damage litigation, see Gellhorn & Kovacic, ANTITRUST LAW AND ECONOMICS at p. 462-4 (1994).

[51] See FTC v. Milan Labs., Inc., 99 F. Supp. 2d 1, 4-5 (DDC 1999). The court first found that the FTC could seek disgorgement under Section 5. It then found analogous powers in states whose statutes are to be interpreted as being consistent with the FTC Act.

economic actors will behave differently. At one end of the spectrum, there may well be a subset of economic actors who are not currently deterred from antitrust violations notwithstanding of the panoply of remedies and penalties currently applicable. Next to this subset of potential antitrust violators may be a population of actors who would be less risk averse, assuming that one or more regimes of enforcement remedies were lessened. I submit that both of these subsets is relatively sparse in number. However, for the remainder of the set of individuals or entities who could be potential antitrust violators, it is submitted that the current deterrent regime is more than adequate. This population is large, and probably increasing, assuming a positive relationship between detection, punishment, and risk aversity. In fact, it is more likely than not to be annihilative, and depending on the motives and success of plaintiffs in picking settlement targets, may reap allocative inefficiency. In the wake of the Electrical Equipment Cases of the 1950's, at least two companies dropped out of the power switch gear market, leaving it to substantially larger co-conspirator rivals.[52]

In forty-three years of antitrust practice, I have not met anyone yet who has complained that he or she was either deterred or undeterred because of the prospect of joint and several liability. This is simply not part of the domain of discourse. What they do know about, is jail time, criminal fines, treble damages, and loss of income. They are more concerned about peer approbation, and particularly concerned about loss of income opportunities, and opportunities for advancement. I have never had a discussion with an antitrust felon, or prospective felon, on the niceties of what Lord Kenyon meant in Merryweather.[53] Not surprisingly, deterrence functions at a personal, as well as a corporate level.

In fact, information relating to antitrust deterrent regimes is highly asymmetrical. In addition, it is highly fact selective. In my experience over more than four decades, I have heard of few alleged antitrust violators, corporate or individual, unable, or unwilling to articulate a series of factors in mitigation of comparative responsibility. This is particularly so, in a fact

---

[52] Prepared Statement of Don T. Hibner, Jr., Hearings before the Subcommittee on Antitrust, Monopoly and Business Rights of the Committee on the Judiciary Unites States Senate, 96 Cong., First Sess. on S. 1468 (June 12, 1979).

[53] However, on several occasions, I have heard sincere concerns from convicted antitrust felons about the prospect of being housed in a general prison population with "real criminals".

pattern subject to rule of reason analysis. They counsel themselves that their motives and actions were benign, and not base. They may remember that their collaborations with competitors were within the framework of a trade association, a joint venture, the chamber of commerce, or a standard setting group. They may even remember themselves best as a participant in an "industry code of ethics" committee. Some will remember, and believe, that they were engaged in combating fraud within the frame work of Cement Mfrs Protective Association.[54] They may believe themselves to be involved in combating "ruinous competition", or "unlawful foreign imports". Some will state that they are simply maximizing opportunities to obtain competitive information, that is otherwise publicly available, although not as conveniently as talking with one's competitor. Some may believe that they have been defending America's small business from "unfair competition". Some may believe that they are the "small dealers and worthy men."[55]

The fact remains, however, that depending on market structure, size and shape, and upon inferences that may be drawn, properly or improperly, as to seemingly parallel behavior, their view as to their relative non-culpability is often far from frivolous. This tells us that in an antitrust world increasingly populated by economic and rule or reason analysis, we should recognize that "one size does not fit all," and that there are gradations of relative responsibility. This is why I subscribe to General Baxter's bill which he sponsored in 1982, namely H.R. 5794. It provides, in part that:

> "4I(f)(2) With respect to claims based upon price fixing among competitors, contribution shares shall be determined on the basis of the relative magnitude in the affected market of each such competitor's sales or purchases of goods or services subject to the violation.
>
> (3). In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each

[54] Cement Mfrs Protective Association v. United States, 268 U.S. 588 (1925).

[55] United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 340 (1897).

party for the origination or perpetration of the violation for which damages have been awarded and the benefits derived therefrom."[56]

Many actions, which may result in the finding of an antitrust violation, may be characterized as being ambiguous, in once sense or another. One of the best ways to combat ambiguity is through education. This is why I encourage and applaud the Antitrust Division in basing sentencing recommendations, in part, on the presence and efficacy of Corporate Antitrust Compliance Programs. However, a caveat is in order. Once upon a time, an antitrust lawyer counseled a client against going forward with a merger, and advised that more likely than not, it would be attacked as a violation of Section 7 of the Clayton Act. After the transaction was consummated, challenged, and divested, the client asked the lawyer why he had not warned him that there could be antitrust concerns. The lawyer advised that I had done exactly that. Without missing a beat, the client then retorted, "Well, you didn't tell me hard enough!"

In light of the myriad of situations, and shades of gray, that may surround a transaction raising substantial antitrust issues, it makes sense to make comparative fault evaluations where it is meaningful to do so. The courts do not have any particular difficulty in applying comparative fault in common, garden variety negligence actions, securities litigation and other fields of litigation activity. I believe that now is the time to seriously consider the wisdom of Bill Baxter's foray into the contribution and claims reduction area. Accordingly, I recommend H.R. 5794 as a "basing point."

A final word about sharing agreements. Sharing agreements have been with us for a long time. I remember negotiating one back in 1965. It was relatively straight forward, and not particularly difficult to draft. This was, however, for a number of fact specific reasons. First, the products involved were relatively homogenous, the technology involved relatively developed, and the relative market shares of the companies were generally stable through time. In other words, the parties shared a high degree of economic commonality. However, in a developing market, with numerous heterogeneous competitive opportunities, or disparate size among the participants, a sharing agreement is much more difficult to negotiate. But, nevertheless, sharing agreements, when they work, may work well. We should incentivize claim settlement and

[56] H.R. 5794, 97th Cong., 2d Sess. (1982).

resolution, hopefully, at terms satisfying to the settlement parties. For the reasons stated above, I would recommend that serious consideration be given to utilizing Bill Baxter's bill as a benchmark for drafting a comprehensive contribution and claim reduction bill.

Don T. Hibner, Jr.

EXHIBIT A

H.R.5794, 97th CONG., 2d SESS. (1982)

To amend the Clayton Act to establish a right of contribution with respect to damages in certain actions brought under such Act.

IN THE HOUSE OF REPRESENTATIVES

March 10, 1982

Mr. McClory introduced the following bill;
which was referred to the Committee on the Judiciary

A BILL

To amend the Clayton Act to establish a right of contribution with respect to damages in certain actions brought under such Act.

CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is mended by inserting after section 4H the following new section:

"Sec.4I.(a) Any person who is liable for damages in an action brought under section, 4A, or 4C of this Act may claim contribution, in accordance with this section, from fly other person jointly liable for such damages.

"(b) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

"(c) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

"(d) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into a good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

"(e) In any action under section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of— "

"(1) any amount stipulated for this purpose;

"(2) the amount of the consideration paid for the release; or

"(3) the contribution share of the person released.

"(f)(l) Contribution and claim reduction rights shall, to the extent consistent with the hr and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which contribution or claim reduction rights are claimed.

"(2) With respect to claims based upon, price fixing among competitors, contribution shares shall be determined on the basis of the relative magnitude in the affected market of each such competitor's sales or purchases of goods or services subject to the violation.

"(3) In determining contribution shares with respect to all other claims, the court shall consider the relative responsibility of each party for the origination or perpetration of the violation for which damages have been awarded and the benefits derived therefrom.

"(g) Unless inconsistent with the just and expeditious conduct of litigation, contribution and claim reduction rights shall be determined by the court sitting without a jury.

"(h) Nothing in this section shall affect the joint and several liability of any person."